FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1717

NORMANDY INSURANCE COMPANY,

Appellant,

v.

MOHAMMED BOUAYAD and VALUE CAR RENTAL, LLC,

Appellees.

On appeal from an order of the Office of the Judges of Compensation Claims.
Neal P. Pitts, Judge.

Date of Accident: June 28, 2019.

August 16, 2023

ROWE, J.

Normandy Insurance Company appeals an order of the Judge of Compensation Claims (JCC) awarding workers' compensation benefits to Mohammed Bouayad. Bouayad was shot seven times at close range by an unidentified shooter while at work for Value Car Rental, LLC. The parties stipulated that the shooting occurred in the course and scope of Bouayad's employment with Value, so the only issue in dispute was whether the injuries Bouayad sustained in the shooting arose out of the work he performed for Value. The

JCC found that they were and awarded benefits. We disagree and set aside the order of the JCC.

Facts

Bouayad worked as the general manager for Value in the Orlando International Airport Holiday Inn. The business was near the airport and an industrial park. The premises of the car rental business consisted of a kiosk desk inside the hotel atrium and an office in a separate building next to the hotel swimming pool. The kiosk and the office were separated by a fifty-foot covered walkway with bushes on one side and what Bouayad alleges was a poorly lit smoking area to the other side. At the end of his work day, Bouayad would carry the final car rental agreements and any cash from the kiosk to the outside office. On June 28, 2019, around midnight, Bouayad was walking from the kiosk to the office with one last rental agreement, but no cash. As he passed the smoking area, an unknown assailant emerged and shot him seven times at close range.

A surveillance video captured the shooting. The video showed that the shooter emerged from an unknown location, entered the courtyard where Bouayad was walking, shot Bouayad, and turned to leave. The shooter then turned back and shot Bouayad several more times before fleeing. The shooter did not attempt to rob Bouayad or take anything from him. The shooter's face was not clearly visible on the video.

Though seriously wounded, Bouayad managed to make his way back to the hotel lobby before collapsing. A hotel guest came to Bouayad's aid. After stating that he did not want to die, Bouayad told the guest, "Robert shot me." He also advised her that the police should look for a blue Mustang. Bouayad sustained injuries to his left hand, left leg, right arm, intestines, stomach, and brain. He suffered several strokes, lost his right kidney, and lost part of his vision.

Bouayad petitioned for workers' compensation benefits, including indemnity and medical benefits. Value and its insurance carrier, Normandy, (the "E/C") denied that Bouayad was entitled to benefits.

The E/C argued that the injuries Bouayad sustained from the shooting did not arise out of the work he performed for Value. Rather, there was reason to believe that Robert Aponte was the shooter and that the shooting stemmed from a conflict between Bouayad's son, Adam, and Aponte. The day before the shooting, Adam and his mother were confronted by Aponte and Anastasia Matos over an alleged debt. This confrontation occurred at a check-cashing business owned by the Bouayad family. Aponte threatened to kill Adam and Matos pushed Adam's mother.

The E/C argued that the shooting that occurred the next day at Value was likely related to the threat Aponte made to Bouayad's wife and son. The E/C offered evidence that right after the shooting, Bouayad told the hotel guest who came to his aid that "Robert" shot him. Bouayad also told the hotel guest that the police should look for a blue Ford Mustang. The E/C presented evidence that Aponte owned a blue Ford Mustang. And a police officer testified that Aponte often stayed at the hotel where Bouayad worked and was shot. In fact, according to the officer, the hotel was registered as a residence for Aponte.

But despite the evidence suggesting Aponte's involvement, the police did not charge Aponte with the shooting. Several people who knew Aponte, including Bouayad's son and wife, viewed a photo of Aponte and the shooter depicted in the surveillance video. These witnesses denied that Aponte was the shooter.

Bouayad identified "Robert" as the assailant the night he was shot. But he claimed at trial that Robert was not the shooter. Instead, he contended that the shooting was work-related. Bouayad presented expert testimony from criminologists that he faced an increased risk of becoming a crime victim when at work at Value as compared to the risk he faced when he was at home. His experts testified about the inherent risks stemming from Bouayad's job responsibilities at Value, his work hours, and the location of the car rental business near the Orlando airport. The experts provided statistics showing that the crime rate in the area near the hotel was fifteen times higher than the area near Bouayad's home. The experts then testified that a person was twelve times more likely to become a violent crime victim in the

area near the hotel versus the area near Bouayad's home. In addition, a security expert testified that a combination of the location of the hotel and the location of the shooting—including the dimly lit area and the surrounding vegetation along the walkway between the kiosk and the office—contributed to Bouayad becoming a crime victim while at work.

Bouayad also presented testimony about past incidents of crimes at the workplace. Sean Belghazi, Value's co-owner, testified that a few years before the shooting, several rental cars had been stolen. Belghazi described some vandalism in the parking lots where the rental cars were kept. Even so, he was unaware of any violent crime on the premises before the shooting. Belghazi testified that three employees were fired in the weeks before the shooting: two for theft and one for failing a drug test. But none of the terminated employees threatened violence.

In response to Bouayad's expert testimony on crime statistics, the E/C presented the testimony of multiple criminology experts. Dr. Kennedy, a criminologist, concluded that Bouayad was a victim of targeted, premeditated violence. He testified that the shooting was not a robbery. The circumstances suggested more likely than not that the shooting was a targeted attack against Bouayad. He also concluded that if the lighting and landscaping surrounding the walkway that led to the outer office contributed to the commission of crimes, then one would expect to see that other crimes had been committed in that area. But there were none. Dr. Kennedy reviewed crime reports for a one-mile area surrounding the Bouayads' home and for a one-mile area surrounding the hotel. Based on that data, he concluded that there was a higher risk of violent crime surrounding Bouayad's residence than there was surrounding the hotel. He concluded that the hotel did not pose an increased risk of violent crime.

The E/C also presented the testimony of a security expert, Elizabeth Dumbaugh. She testified that the lighting in both the exterior walkway and the smoking area was sufficient. She found no conditions present at the hotel that caused or contributed to Bouayad's shooting. She did not believe that the past crime data suggested a dangerous condition or a high risk of violent crime at

the hotel. She concluded that Bouayad was not at an increased risk of crime at the hotel.

After hearing the evidence, the JCC entered a final compensation order finding that Bouayad's injuries were compensable. The JCC found that "the evidence [did] not establish the identity of the shooter" and "the evidence [did] not establish the motive for the shooting." Even so, the JCC concluded that Bouayad's "employment substantially contributed to the risk of injury and to risks which [Bouayad] would not normally be exposed to during his nonemployment life." The E/C moved for rehearing, asserting that Bouayad failed to establish occupational causation. The E/C cited several cases involving workplace violence and argued that in none of the cases was a "mystery assault" found compensable. The JCC granted rehearing.

The JCC then entered an amended final order and significantly altered his findings and conclusions. The JCC still found that Bouayad's injuries were compensable. But this time, the JCC found that the shooting was "a targeted attack based upon inside information that [Bouayad] would be working late." The JCC concluded that "the reason for the targeted attack was more likely than not related to the termination of a prior employee[s] or other job related issue rather than the incident with Robert Aponte."

The JCC then concluded that Bouayad's work environment "contributed to a higher likelihood that [Bouayad] would be a victim of a crime at the hotel then he would be at a dwelling in a residential neighborhood." The JCC found that in Orlando murders occur at much higher rates during the hours between midnight and 3:59 a.m. And the JCC found that the crime rate was higher in the hotel area where Value was located and a person is more likely to be the victim of violent crime in the area near the hotel than in the area near Bouayad's home. The JCC then concluded that Bouayad's employment substantially contributed to the risk of an attack and to risks that Bouayad would not normally be exposed to during his nonemployment life. The JCC concluded that the work Bouayad performed for Value was the major contributing cause of the shooting because, but for the movement of Bouayad walking between the kiosk and the outside

office, the shooting would not have occurred at the time and place it did. The E/C again moved for rehearing. But the JCC denied the motion. This timely appeal follows.

Standard of Review

This Court reviews the JCC's factual findings to determine whether they are supported by competent, substantial evidence. *Sanchez v. YRC, Inc.*, 304 So. 3d 358, 359 (Fla. 1st DCA 2020). And we review the JCC's conclusion of law de novo. *Id.*

Two-Prong Analysis

To be compensable under the Workers' Compensation Law, an employee must suffer "an accidental compensable injury . . . arising out of work performed in the course and scope of employment." § 440.09(1), Fla. Stat. (2018). The "arising out of" element refers to "the origin of the cause of the accident." *Silberberg v. Palm Beach Cnty. Sch. Bd.*, 335 So. 3d 148, 154 (Fla. 1st DCA 2022) (quoting *Bituminous Cas. Corp. v. Richardson*, 4 So. 2d 378, 379 (Fla. 1941)). And "in the course and scope of employment" refers to "the time, place, and circumstances under which the accident occurs." *Id.* "[F]or an injury to arise out of and in the course of one's employment, there must be some causal connection between the injury and the employment or it must have had its origin in some risk incident to or connected with the employment or that it flowed from it as a natural consequence." *Fid. & Cas. Co. of N.Y. v. Moore*, 196 So. 495, 496 (Fla. 1940).

Burden of Proof

To obtain benefits, it is the claimant's burden to show that both requirements are satisfied. *MBM Corp./Sedgwick Claims Mgmt. Servs. v. Wilson*, 186 So. 3d 574, 576 (Fla. 1st DCA 2016). A claimant must prove that his injury "was the result of an accident happening not only in the course of his employment but arising out of it."[1] *Travelers Ins. Co. v. Taylor*, 3 So. 2d 381, 383 (Fla. 1941);

[1] In 1993, the Florida Legislature amended section 440.02(36), Florida Statutes to add a definition for "arising out of." *See* Ch. 93-415, § 2, at 73. Laws of Fla.; *id.* § 112m at 215 (providing for

see also Gray v. Employers Mut. Liab. Ins. Co., 64 So. 2d 650, 651 (Fla. 1952) (explaining that the claimant must "make a showing of some event or circumstances connected with his work to which his injury can be directly attributed"); *Church's Chicken v. Anderson*, 112 So. 3d 545, 546 (Fla. 1st DCA 2013) (explaining that the claimant has the burden to prove that treatment was necessitated by an injury that arose from a work-related accident).

Here, the E/C conceded that Bouayad's injuries occurred in the course and scope of his employment. So Bouayad only needed to show that his injuries arose out of the work he performed for Value. Thus, it was his burden to show occupational causation; it was not the E/C's burden to show that there was a non-work cause of his injuries. *See City of Titusville v. Taylor*, 288 So. 3d 731, 736 (Fla. 1st DCA 2019) ("Proof of causation is wholly the employee['s] and the [E/C] is under no obligation to produce evidence to disprove the claim.").

Only after Bouayad satisfied his burden of showing that his injury occurred in the course and scope of employment and arose out of the work performed, would the burden shift to the E/C to prove any affirmative defense. *Cf. Eaton v. City of Winter Haven*, 101 So. 3d 405, 406 (Fla. 1st DCA 2012). Among the defenses available to the E/C is that there was another "contributing cause[] leading to an injury or disability." *Silberberg*, 335 So. 3d at 154 (quoting *Orange Cnty. MIS Dep't v. Hak*, 710 So. 2d 998, 999 (Fla. 1st DCA 1998)). For example, the E/C could defend on grounds that the claimant's injury was "the result of a personal risk such as an idiopathic preexisting condition." *Bryant v. David Lawrence Mental Health Ctr.*, 672 So. 2d 629, 631 (Fla. 1st DCA 1996). In such a case, the E/C would need to "carry the burden of proving the existence of such a condition." *Id.*

January 1, 1994, effective date for the amendment) After the 1993 amendments, a JCC may not blend or meld the two requirements of occupational causation and course and scope to determine compensability. The requirements are distinct and are to be established separately. To be compensable, the injury must arise out the work performed **and** occur in the course and scope of employment.

And assuming that the E/C meets its burden to establish that multiple causes contributed to a workplace injury, before a JCC can award benefits, he must find that "work performed in the course and scope of employment [was] the major contributing cause of the injury or death." *Silberberg*, 335 So. 3d at 154 (quoting § 440.02(36), Fla. Stat.); *Hak*, 710 So. 2d at 999 (requiring employees to "establish that the employment occurrence is the most preponderant cause of the injury"). The major contributing cause standard requires "work to be more than just *a* cause—it must be the *preponderant* cause compared to any idiopathic cause." *Silberberg*, 335 So. 3d at 157.

But when there is only one cause of a workplace injury, it is unnecessary to determine the preponderant cause of a claimant's injury. *Closet Maid v. Sykes*, 763 So. 2d 377, 381 (Fla. 1st DCA 2000) (explaining that "if there are two causes for a disability or the need for treatment, the workplace accident must be the 'greater' of the two causes"). This is because the analysis of major contributing cause cannot be performed "in a vacuum, or particularly, in the absence of competing causes." *Teco Energy, Inc. v. Williams*, 234 So. 3d 816, 821 (Fla. 1st DCA 2017) (quoting *Cespedes v. Yellow Transp., Inc.*, 130 So. 3d 243, 249 (Fla. 1st DCA 2013)).

Here, there are no competing causes to assess. Although the identity and motive of the shooter are unknown, the **cause** of Bouayad's injuries is known. He was shot. Seven times at close range by an unidentified assailant. There was no evidence of any other cause. Being shot was the one and only cause of Bouayad's injuries.

There were no competing causes, and the E/C did not trigger the major contributing cause analysis by claiming the shooting was personal in nature. Rather, the E/C had no burden to prove a lack of occupational causation or offer evidence of a competing cause. Bouayad never established occupational causation in the first instance.

We acknowledge earlier decisions from our Court where there was but one occupational cause and where the claimant was

relieved of the burden of presenting evidence of major contributing cause. *See Walker v. Broadview Assisted Living*, 95 So. 3d 942, 943 (Fla. 1st DCA 2012) ("Because there were **no competing causes** of the accident and injury, Claimant's work activity was de facto the major cause.") (emphasis supplied); *Caputo v. ABC Fine Wine & Spirits*, 93 So. 3d 1097, 1099 (Fla. 1st DCA 2012) ("**In the absence of competing causes** of Claimant's accidental injuries, Claimant satisfied the major contributing cause requirement when evidence showed that he was removing shelving in the Employer's store at the time of the accident . . . .") (emphasis supplied); *Lanham v. Dep't of Env't Prot.*, 868 So. 2d 561, 563 (Fla. 1st DCA 2004) ("In that the record discloses **there was only one cause** of claimant's injuries, rather than competing causes, claimant was not required to present additional evidence going to the issue of whether the work-related accident was the major contributing cause of the injuries.") (emphasis supplied).

The key in each of these cases is that the claimants met their burden to show that the work they performed for the employer was causally connected to their injury under the "any exertion" test. *See Walker*, 95 So. 3d at 943 (injuries from a fall caused by the claimant's walking to retrieve a package for her employer); *Caputo*, 93 So. 3d at 1099 (injuries from a fall caused by the claimant "cutting down shelving with a saw in the Employer's store, performing one of his job duties"); *Lanham*, 868 So. 2d at 563 (injuries from a fall caused by the claimant's walking while on a comfort break at work). Under the "any exertion" test, when a claimant's fall is caused by walking in furtherance of his work duties, the claimant can establish a causal connection between the work performed and the injury from the fall because the mundane exertion of walking can lead to a fall. *See Silberberg*, 335 So. 3d at 158 ("[T]he mundane exertion of walking to get around at work is enough to establish a work cause because the 'any exertion' test does not look at the quality or quantity of the activity.").

But it is unreasonable to suggest that the mundane exertion of walking to get around work can be "causally connected" with an injury from a shooting—unless perhaps the employee is working at a gun range. Even with the "any exertion" test, the claimant must still show a causal connection between the exertion and the injury. *See Mkt. Food Distribs., Inc. v. Levenson*, 383 So. 2d 726,

727 (explaining that to satisfy the "any exertion" test, "it is still necessary for a claimant to establish that medically the particular exertion causally contributed to the injury."); *accord Ross v. Charlotte Cnty. Pub. Sch.*, 100 So. 3d 781, 782 (Fla. 1st DCA 2012). Bouayad established only that he was shot while walking, not because he was walking.

And so, because there was but one cause of Bouayad's injuries—being shot, it was Bouayad's burden to show that the known cause of his injury arose from the work he performed for Value. And because he failed to establish occupational causation in the first instance, the burden never shifted to the E/C to assert a non-work cause of the accident.

Arising Out of the Work Performed

To obtain benefits, Bouayad needed to show that his injuries arose out of the work he performed for Value. When he was shot, Bouayad was walking between two of Value's facilities. Walking was essential to the work Bouayad performed for Value. But did the walking itself cause Bouayad to suffer injuries from a shooting? The answer is no.

Chapter 440 does not cover workplace injuries; it covers work-caused injuries. No doubt the workers' compensation system is a no-fault system. Section 440.10(2), Florida Statutes, states: "Compensation shall be payable irrespective of fault as a cause for the injury . . . ." Thus, when an employee is injured in the course and scope of employment and the injury arises out of the work he performed, it matters not whether the employer or employee was at fault. But even though an employee need not establish **fault**, an employee must establish **occupational causation** for his injuries. Put differently, although workers' compensation benefits are payable **irrespective of fault**, they are not payable **irrespective of cause**.

Instead, proof of occupational causation is a sine qua non for compensability of a workplace injury. Occupational causation cannot be established "based *solely* on a showing that but for the employee being at work, 'he would not have been injured in the manner and at the particular time that he was hurt.'" *Silberberg*,

335 So. 3d at 155 (quoting *Hernando Cnty. Sch. Bd. v. Dokoupil*, 667 So. 2d 275, 276 (Fla. 1st DCA 1995)); *Sentry Ins. Co. v. Hamlin*, 69 So. 3d 1065, 1071 (Fla. 1st DCA 2011) ("Mere presence at the workplace is never enough, standing alone, to meet the 'arising out of' prong of the coverage formula.").

So it was not enough that Bouayad established that he was at work and was shot **while walking** between the premises of his employer. These facts establish only that he was in the course and scope of his employment when he was shot. Bouayad had to show that he was he was shot **as a direct result of** the walking (arising out of).[2]

The question for the JCC was—did the work Bouayad performed for Value—walking between Value's facilities—itself cause him to be shot seven times at close range? There is no question that the walking itself did not cause Bouayad's injuries. Rather, it was the act of the shooter that caused his injuries. So how can it be said that his injuries arose from the work Bouayad performed?

Despite the occupational causation standard set out in Chapter 440, the Florida Supreme Court and this Court have found an employee's injury compensable, even when the injury is caused by an act of a tortfeasor. *See Strother v. Morrison Cafeteria*,

---

[2] Our decision here does not conflict with *Soya*. *See Soya v. Health First, Inc.*, 337 So. 3d 388 (Fla. 1st DCA 2022) (finding an employee's clumsiness was "covered" and explaining that when the cause of the workplace accident "is unknown, it is error to deny compensability on grounds that the accident could have happened elsewhere") (citations omitted). This case is easily distinguishable. This is not a trip-and-fall case in which an employee can establish occupational causation even when his own clumsiness while walking is the cause for his falling and sustaining injuries at work. When, as in *Soya*, an employee has to walk in the performance of his work, and then trips and falls as a result of walking (and there are no competing causes), injuries from the fall are compensable. Bouayad's walking in the performance of his work did not cause him to suffer injuries from a shooting.

383 So. 2d 623 (Fla. 1980) (finding injuries from physical attack compensable when cashier was robbed by assailants who targeted her based on knowledge that she carried cash deposits for her employer); *see also Santizo-Perez v. Genaro's Corp.*, 138 So. 3d 1148 (Fla. 1st DCA 2014) (employee was struck by a car driven by a co-worker's jealous boyfriend while the employee collected shopping carts for his employer in the grocery store parking lot); *Jenkins v. Wilson*, 397 So. 2d 773 (Fla. 1st DCA 1981) (employee was abducted from the office parking lot and raped). Further, section 440.39, Florida Statutes allows an injured employee to claim workers' compensation benefits, while also instituting suit against a third-party tortfeasor. *See Jones v. Martin Elecs., Inc.*, 932 So. 2d 1100 (Fla. 2006) ("Section 440.39 of Florida's workers' compensation statute ensures both that litigants will not be allowed double recovery for their injuries and that workers' compensation coverage will not ultimately be responsible in situations where an employee's injuries are caused by the employer's, or any other third party's, tortious conduct"). Even so, nothing in chapter 440 relieves an injured worker of their burden to establish occupational causation when seeking workers' compensation benefits.

When an employee's injuries stemmed from an act of a tortfeasor, courts have considered motive—the words or conduct of the employee and the assailant that precipitated the act causing injury to the employee—as a relevant factor in the analysis of occupational causation. The leading case from the supreme court, *Strother*, involved a robbery. There, the employee, a cashier who worked at Morrison Cafeteria, offered evidence of motive to show that the assailants planned to rob her after observing her carrying cash deposits for Morrison. *Strother*, 383 So. 2d at 624. Strother explained that the assailants, who were not customers or employees, watched her while she was at work in the two days right before the attack. *Id.* And she saw her assailants at her workplace on the night of the attack. That night, Strother drove directly home from the cafeteria where the assailants assaulted her and took her purse. *Id.* On those facts, the supreme court held that there was "no issue that the injury sustained as a result of the assault arose out of employment." *Id.* at 628.

Prahl Brothers, Inc. v. Phillips, 429 So. 2d 386, 387 (Fla. 1st DCA 1983) also involved a robbery. There, the employee sustained a compensable psychiatric injury when she was assaulted during an armed robbery. The employee was working as a switchboard operator at a hotel when a robber placed a gun to her head, removed a ring from her finger, and forced her to lie on the floor. *Id*. This Court specifically identified the motive for the armed robbery, calling it an employment-related robbery: "Testimony of claimant's treating physician clearly established that this psychiatric impairment was precipitated by **the employment-related robbery**, and that a gun being placed to her head and a ring being physically removed from her finger were significant circumstances in the **causal etiology of claimant's mental injury**." *Id*. (emphasis supplied).

Santizo-Perez, involved an assailant striking and killing a grocery store employee with his car while the employee was collecting carts in the parking lot of his employer's grocery store. The employee's family offered evidence to the JCC of the assailant's motive, specifically that he targeted the employee based on the assailant's belief that the employee was sexually harassing the assailant's girlfriend, the employee's co-worker. On those facts, this Court held "there is no question **the genesis for the 'dispute' giving rise to the fatal injuries** here was in the workplace." *Id*. at 1150 (emphasis supplied).

Tampa Maid Seafood Products v. Porter, 415 So. 2d 883, 884 (Fla. 1st DCA 1982), involved a stabbing. There, a love triangle involving three co-workers at a seafood company resulted in one of the co-workers stabbing the employee with a shrimp knife. This Court held that the employee satisfied her burden to show that her injuries arose out the work she performed when she offered proof that the assailant "became incensed over the gossip" in the workplace and that the employee's employment "became a contributing factor" by "facilitating an assault which would not otherwise have been made." *Id*. at 885.

But claims of injury caused by a tortfeasor's acts will not be found compensable under chapter 440 when an employee fails to meet their burden to establish an occupational cause. *Ivy H. Smith Co. v. Wingo*, 404 So. 2d 1118, 1119 (Fla. 1st DCA 1981), involved

an assault with a weapon. There, this Court held that the employee's shoulder injury sustained from an assault with a weapon wielded by a co-worker was not compensable. The dispute arose between the employee and his co-worker when the employee told the co-worker he would no longer allow him to carpool to work because the co-worker had not paid for transportation the prior week. *Id.* In finding no occupational causation for the employee's injuries, this Court explained: "the claimant's employment contributed nothing to the assault instead, the basis for that assault was a carpool arrangement that was not a part of employment. Therefore, the claimant did not sustain an injury arising out of employment . . . ." *Id.*

San Marco Company, Inc. v. Langford, 391 So. 2d 326 (Fla. 1st DCA 1980), involved an employee who was shot by a co-worker. There, this Court held that the injuries sustained by the employee had no occupational cause. Rather, the Court held that "[i]t is clear to this court that the assault in this instance was the result of personal animosity." *Id*. at 327. As to the shooting itself, "[t]hat it occurred on the premises of the employer was merely fortuitous." *Id*.

That is exactly case here. There is no causal link between the injuries Bouayad suffered in the shooting and the work he performed for Value. The only work activity performed by Bouayad at the time of the shooting was walking from the kiosk to the outer office while carrying a rental agreement. The identity of the shooter was unestablished, his motive was unknown, and no evidence connected the shooter to the work Bouayad performed for Value.

Bouayad failed to prove that the injuries he suffered in the shooting were **caused by** the work he performed for Value. *See Sentry Ins. Co.*, 69 So. 3d at 1071 (explaining that mere presence is never enough to show that an injury arose out of a claimant's employment); *see also Silberberg*, 335 So. 3d at 155 (explaining that occupational causation cannot "be established based *solely* on a showing that but for the employee being at work, 'he would not have been injured in the manner and at the particular time that he was hurt'" (quoting *Dokoupil*, 667 So. 2d at 276)).

Nor was it enough to satisfy his burden to prove occupational causation for Bouayad to present evidence suggesting that his workplace is in a high-crime area, making it more likely that he would become a crime victim. The expert testimony offered by Bouayad comparing crime rates for the area near the car rental business and the airport to crime rates in the area near Bouayad's home does not provide competent, substantial evidence to show that the work performed by Bouayad—walking between two parts of his employer's premises—caused the injuries he suffered in the shooting.

Conclusion

Bouayad did not meet his burden to prove that the injuries he suffered arose out of the work he performed for Value. The sole cause of his injuries was that he was shot. At most, the work he performed for Value placed Bouayad in the wrong place at the wrong time. This is not enough to establish occupational causation. *See Sentry Ins. Co.*, 69 So. 3d at 1071. Because no evidence in the record supports the JCC's finding that the work performed by Bouayad at Value caused his injuries, we set aside the JCC's order awarding benefits to Bouayad.

Certified Question

We have analyzed whether Bouayad's injuries caused by the shooter were compensable under the Workers' Compensation Law, while also applying the Supreme Court's decision in *Strother* and its progeny. Even so, we have serious doubts—particularly given the 1994 amendments to chapter 440—whether an employee's injury caused solely by the act of a tortfeasor can be compensable under the Workers' Compensation Law. *Strother* and the decisions that follow it seemingly import a risk exposure element into the analysis of occupational causation—contrary to the Legislature's express intent for occupational causation to turn on whether the work performed caused the employee's injury. For these reasons, we certify to the Florida Supreme Court the following question of great public importance:

> NOTWITHSTANDING *STROTHER V. MORRISON CAFETERIA*, 383 SO. 2D 623 (FLA. 1980), WHEN AN ACT OF A THIRD-PARTY

TORTFEASOR IS THE SOLE CAUSE OF AN INJURY TO AN EMPLOYEE WHO IS IN THE COURSE AND SCOPE OF EMPLOYMENT, CAN THE TORTFEASOR'S ACT SATISFY THE OCCUPATIONAL CAUSATION ELEMENT, AS DEFINED BY SECTION 440.02(36), FLORIDA STATUTES, NECESSARY FOR COMPENSABILITY UNDER THE WORKER'S COMPENSATION LAW?

VACATE.

WINOKUR, J., concurs with opinion; KELSEY, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

WINOKUR, J., concurring.

I fully concur with the majority opinion and the decision to certify a question of great public importance to the Florida Supreme Court. I write to address the contention that "risk exposure" provides an appropriate substitute for the statutory requirement of occupational causation.

The most obvious drawback to this contention is that it allows us to base compensability on a factor contrary to the statutory scheme, which requires occupational causation regardless of the risk to which the employee was exposed. *See* § 440.02(36), Fla. Stat. But even if we could consider risk exposure as a substitute for occupational causation, the line-drawing challenges required for such analysis would be difficult, if not impossible, to overcome. If Bouayad's walk had occurred at dusk, as opposed to midnight, would Bouayad have been exposed to enough risk to make the shooting compensable? Why or why not? How dark did the walkway have to be before the shooting would be compensable? If the shooting had occurred in a mixed-use development rather than in "heavily commercial surroundings," as the dissent characterizes the shooting location, would that alter the conclusion? Why would

Bouayad be less entitled to workers' compensation if he had been shot in a residential gated community in broad daylight? How much exposure to the risk of harm from an outsider is enough to support compensability, and is it necessary to secure a criminologist's opinion to support the party's position? These questions are impossible to answer; the only conclusion would be to stack up enough indicators of "risk" that it would support an arbitrary conclusion of compensability.[1]

In any event, the Workers' Compensation Law does not require us to engage in any analysis of the sort: the claimant must prove that the injury was caused by work, not that the employee was exposed to any particular level of risk.[2] With these observations, I concur with the majority opinion.

---

[1] Exposure-to-risk analysis also bases compensability on the foreseeability of the harm to the employee, plainly a tort concept. *See*, *e.g.*, Restatement (Third) of Torts § 19 (Am. Law Inst. 2010) ("The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of . . . a third party."); s*ee also id.* § 19 cmt. e (describing pertinent cases as those "in which the defendant's conduct creates or increases the probability of harm caused by third-party misconduct"); Restatement (Second) of Torts § 302B (Am. Law Inst. 1965) ("An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."). Such analysis would explain why an employee shot in a dangerous location is entitled to compensation, whereas an employee unexpectedly shot in a safe location is not. As the dissent argues, fault does not provide the basis for workers' compensation liability; occupational cause does. Because it is based on the fault of the employer for exposing the employee to risk, exposure-to-risk analysis would make workers' compensation law far more similar to tort law than the majority's occupational cause analysis does.

[2] I also disagree that *Santizo-Perez v. Genaro's Corp.*, 138 So. 3d 1148 (Fla. 1st DCA 2014), supports the argument that "risk-exposure analysis of the course-and-scope evidence can establish the arising-out-of factor." Dissenting op. at 29. While *Santizo-Perez*

KELSEY, J., dissenting.

I. Procedure.

Before addressing the merits, we must address procedure. The majority's certified question begins with "Notwithstanding [Florida Supreme Court precedent]." This phrasing implicitly and correctly concedes that the majority's decision is contrary to Florida Supreme Court precedent: *Strother v. Morrison Cafeteria*, 383 So. 2d 623 (Fla. 1980). We lack authority to do that.

> When a district court believes that a supreme court case has been incorrectly decided or should be reevaluated, the court cannot simply deviate from the supreme court's decision. Rather, the proper procedure is to follow the precedential case and certify a question of great public importance that presents the district court's concerns. *See Strickland v. State*, 437 So. 2d 150, 152 (Fla. 1983); *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) (noting that district courts are free to certify questions and advocate a change in the law when they deem it appropriate but that they are "bound to follow the case law set forth by this Court").

Santiago v. Rodriguez, 281 So. 3d 603, 607 (Fla. 2d DCA 2019). We must follow *Strother*, and our own precedent, under which Claimant is entitled to workers' compensation benefits regardless of his assailant's motives.

---

mentioned that the injury was a risk "incident to the hazards of industry," this observation was ultimately irrelevant because "there is no question the genesis for the 'dispute' giving rise to the fatal injuries here was in the workplace." *Santizo-Perez*, 138 So. 3d 1148 at 1150. Even if we agreed with the *Santizo-Perez* analysis, its "hazards of the industry" language quoted a worker's compensation law treatise, rather than the applicable statute, and is, at best, dicta.

II. Merits.

The majority opinion improperly shifts the question of work-relatedness (i.e., the "arising out of" or "occupational causation" question) to a third-party assailant's motive and intent. This newly announced test is contrary to public policy as the Florida Legislature has expressed it, and contrary to precedent. The ramifications are significant. Consider how this analysis would apply to cases involving other tragic acts of workplace violence. Under the majority's reasoning, a teacher injured or killed in a senseless school shooting loses her workers' compensation benefits. A restaurant worker assigned to close for the night is robbed and assaulted by an unidentifiable thief, and workers' compensation does not apply. Or, as here, a car-rental agency manager carrying the day's paperwork to the back office near midnight is deprived of his workers' compensation remedy by virtue of his inability to prove that the unknown assailant's motive was work-related.

If we test "arising out of" by a non-employee criminal's or tortfeasor's motive, as does the majority, we not only contravene precedent, but we also conflate tort law and comp law, and defeat the purpose of the workers' compensation statutes. The harsh and inevitable reality of this holding is that injured claimants who are victims of crime at work—who often do not have a lawyer—must function as de-facto prosecutors, attempting to identify, apprehend, interview, and subpoena their assailants to prove intent, or rely on the government's independent criminal proceedings (if any)—assuming the assailants decline to assert their Fifth Amendment rights. While claimants labor under this Draconian burden, the workers' compensation statute of limitations would not be tolled. *See* § 440.19, Fla. Stat. (providing for tolling during a pending civil action but with no parallel provisions for criminal proceedings). And yet if injured claimants file a tort claim, they will be met with general liability carriers' asserting intentional tort exclusions and pointing the plaintiffs/claimants back to the comp system.[1] Further, this

[1] If the majority assumes damages incurred from workplace crimes will be covered by the employer's general liability policy, that would be inaccurate. Most such policies exclude coverage for

burden would erode employer immunity protection guaranteed by section 440.10, which mandates that employers "shall secure" payment of compensation to covered employees and service providers. None of this is right. The only disposition in accord with longstanding precedent and the intent of the workers' compensation statutes is to find that this accident arose out of Claimant's employment, entitling him to his workers' compensation benefits.

No statute expressly addresses the "arising out of" question for workplace crime cases. Until now, legislative action has been unnecessary, as the caselaw has applied comp law to these situations and the Legislature has not enacted a different rule of law.[2] But the majority's decision and rationale improperly inject tort law back into the analysis of workplace accidents, contrary to

---

intentional acts. *See, e.g.*, *Norris v. Colony Ins. Co.*, 760 So. 2d 1010, 1011 (Fla. 4th DCA 2000) (illustrating that defendant gas station's general liability policy excluded coverage for damages arising from assault and battery on its premises).

[2] The Legislature is presumed to be aware of relevant judicial decisions and is presumed to have adopted them, absent express legislative action to the contrary. *See City of Hollywood v. Lombardi*, 770 So. 2d 1196, 1202 (Fla. 2000) (noting that "the legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the new version") (quoting *Brannon v. Tampa Tribune,* 711 So. 2d 97, 100 (Fla. 1st DCA 1998)); *see also Potter v. Potter*, 317 So. 3d 255, 258 (Fla. 1st DCA 2021) (following this "well-settled" rule of statutory construction). Despite the passage of decades since this Court has been following its rule that criminal assaults on at-risk workers satisfy the "arising out of" prong for compensability, and the Legislature's annual reenactment of the pertinent workers' compensation statutes without change, the majority purports to change the law on its own. The Legislature may wish to consider overruling this precedent by amending the workers' compensation statutes expressly to cover injuries resulting from criminal acts occurring while claimants are within the course and scope of their employment and placed at risk.

the Legislature's express intent of providing quick, efficient, and self-executing delivery of disability and medical benefits *outside* the civil tort system:

> It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer. . . . The workers' compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike. . . . It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. . . . [T]he Workers' Compensation Law [shall be administered] in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments.

§ 440.015, Fla. Stat. (2019).

Until now, our own precedent spanning decades has recognized and reinforced these guiding principles in cases materially analogous to this one. In *Schafrath v. Marco Bay Resort, Ltd.*, 608 So. 2d 97, 102–03 (Fla. 1st DCA 1992), we emphasized that a claimant's burden of proof in workers' compensation cases is "significantly less than proof by a preponderance of evidence, fundamentally in the sense that the claimant is not held to eliminating the same degree of doubt or uncertainty inherent in the evidence that is required of a party in a court proceeding under the preponderance of evidence rule." We justified this lesser burden of proof based on the Legislature's express standards:

> The Workers' Compensation Act creates a self-executing, non-adversarial system designed to function without the intervention of legal representatives in the vast majority of cases by placing on the employer and carrier the burden to "assure the quick and efficient delivery of

> disability and medical benefits to an injured worker at a reasonable cost to the employer."

Id. at 104. This Court concluded that "it takes little imagination to appreciate that a change in the burden of proof in workers' compensation cases . . . to standards applicable in civil court proceedings would quickly change the workers' compensation scheme to a purely adversarial system and effectively scuttle the self-executing nature of the system." *Id*.

What we rejected in *Schafrath,* the majority is imposing here. While these general principles of course do not dictate comp coverage in all cases, the facts before us demand a finding of compensability. Claimant is entitled to the Legislative mandate of quick and efficient delivery of medical and wage loss benefits within the self-executing workers' compensation system. An employee who is on the job, performing his duties, and injured in a sudden, violent attack that is not proven to be personal in nature, should not be relegated to protracted tort litigation simply because his assailant's motive cannot be proven to have been work-related.[3]

The majority's "arising out of" analysis makes two mistakes we have rejected before. First, the majority asks whether the criminal had a work-related motive—whether the *crime* was work-related—then denies compensability because that is impossible to prove here.[4] Second, the majority fails to recognize and follow our

---

[3] Far from quick and efficient, this was a June 2019 accident, this appeal was filed in June of 2021, and here we are in the second half of 2023, with counseled litigation ongoing over four years after the accident. The original panel held oral argument in April of 2022, and I was randomly substituted onto the panel after Judge Makar was transferred to the Fifth District Court of Appeal effective January 1, 2023. I have made myself familiar with the record and have watched the oral argument video.

[4] The JCC determined that the criminal attack was the major contributing cause (MCC) of Claimant's injuries, but the majority does not address MCC, because it skips directly to the conclusion that the shooting did not arise out of employment and therefore

precedent consistently finding that a workplace crime arises out of employment when the workplace exposes the claimant to an increased hazard of becoming a crime victim.

A. A Criminal's Motive Is Not Dispositive.

The majority's reasoning is that absent a work-related motive, we are left with the mere fact that "He [Claimant] was shot." Maj. Op. at 3. The majority reverses because it concludes Claimant cannot prove that the unknown shooter had a work-related criminal motive. But that is the wrong question. Neither section 440.09, defining coverage, nor this Court, has ever required a claimant to show an assailant's work-related motive. To the contrary, where assailants have injured claimants who were at work and working, we have consistently found compensability without evidence of the assailant's work-related motive. *See New Dade Apparel, Inc. v. De Lorenzo*, 512 So. 2d 1016, 1017–18 (Fla. 1st DCA 1987) (finding compensability where an unknown pedestrian threw a rock through the car window of an employee who was driving back to work after completing a work errand, causing a crash, whereupon the employee was beaten and robbed); *Jean Barnes Collections v. Elston*, 413 So. 2d 797, 797–98 (Fla. 1st DCA 1982) (finding traveling employee's injuries compensable after she was attacked and raped in her hotel room); *Fernandez v. Consol. Box Co.*, 249 So. 2d 434, 434–35 (Fla. 1st DCA 1971) (finding compensability where unknown assailants assaulted and shot employee who was walking on a public street to his car).

Never have we ever before imposed an impossible burden on an injured claimant to prove the intent or mental thought process of a third-party assailant. *See Spleen v. Rogers Group, Inc.*, 548 So. 2d 740, 743 (Fla. 1st DCA 1989) (citing *Talisman Sugar Corp. v. Bruce,* 8 FCR 268 (Fla. Indus. Rels. Comm'n), *cert. denied,* 296 So. 2d 49 (Fla. 1974) (affirming compensability where the claimant, who was not the aggressor, was shot on his employer's premises by

---

could not contribute to cause at all. Our precedent, properly applied, would find that the shooting arose out of employment, triggering the MCC analysis (which is satisfied on these facts and under our precedent).

a fellow worker who had no "discernable motive"). That analysis is particularly relevant here. The Court noted that the appellants' arguments against compensability "would require the Judge of Industrial Claims or [the] Commission retroactively to psychoanalyze the aggressor who shot the claimant." *Id*. A workplace shooting claim arising in the course and scope of employment is compensable even if the shooter's motive is unknown.

Further to the same point, we have observed previously that it is error to rely on a third party's motive as to the "arising out of" prong:

> This case presents a classic example of how courts can hyper focus on motive of a third party causing injury to an employee, ignoring a dangerous environment that also facilitated the injury. As Larson's points out, "[t]he error here is a simple one: The court assumes that the claimant must prove both that the environment increased the risk of the attack and that it was motivated by something related to the employment. The correct rule is that **either** one or the other is sufficient to establish the causal link." 1 Lex K. Larson, Larson's Workers' Compensation § 8.01[1][b] (rev. ed. 2013) (emphasis added).

Santizo-Perez v. Genaro's Corp., 138 So. 3d 1148, 1150 n.4 (Fla. 1st DCA 2014) (opinion by Associate Judge Bergosh, joined by Judges B.L. Thomas and Ray). While this is a footnoted observation, not a holding, it is wise and on-point.

In *Santizo-Perez*, we held that death resulting from assault at work was compensable. *Id.* at 1149–50. There, the employee was a store manager who was in the store parking lot at night, gathering shopping carts. *Id*. at 1148. He was at work, doing his job, in a place where he had to be to do that part of his job. A non-employee assailant intentionally rammed his car into the employee, who died of his injuries. The JCC found that the employee was in the course and scope of employment, but denied compensability using "arising out of" reasoning similar to what the majority uses here. *Id*. at 1149–50. We reversed, noting, importantly, that "[t]he

inquiry is not as to fault." *Id.* at 1150 (citing *Sentry Ins. Co. v. Hamlin*, 69 So. 3d 1065, 1069 (Fla. 1st DCA 2011)).

This pivotal observation quoted from *Santizo-Perez* was and still is correct. The inquiry is not as to fault. In contrast, the majority's analysis here improperly focuses on the assailant's motives, denying compensability because no work-related motive could be established definitively. But while a work-related motive could help establish the "arising out of" prong (and has done so, as mentioned in *Santizo-Perez* and in other cases discussed below), the *absence* of a work-related motive, or the inability to prove motive one way or the other, is not properly the sole inquiry or the sole analytical construct—as addressed in part B below.

Importantly, we have never distinguished between criminal acts and torts in determining compensability under sections 440.09 or 440.092. We have consistently declared compensable those injuries employees suffered while in the course and scope of employment, even if third parties' non-criminal acts caused the injuries. *See Spartan Food Sys. & Subsidiaries v. Hopkins*, 525 So. 2d 987, 988–89 (Fla. 1st DCA 1988) (finding injuries compensable where employee was on an employer errand and her car was rear-ended by a third party); *Fla. Hosp. v. Garabedian*, 765 So. 2d 987, 988–89 (Fla. 1st DCA 2000) (finding compensability following rear-end accident where employee was driving home from work with paperwork she was required to record upon arriving home). Workers' compensation is a no-fault system, and so motive or "fault" has never been the pivotal focus in determining compensability.

The statutory structure is clear, and the relevant precedent is significant. This creation and application of a new court-made standard is improper on many levels. Simply put, the majority's reasoning rewrites coverage analysis to focus on an assailant's intent; i.e., a fault-based work-relatedness test. Claimant is deprived of workers' compensation coverage (and Employer is deprived of freedom from tort liability) because of his inability to prove an unknown assailant's work-related motive. Yet, all other things being equal under the majority's analysis, an identically situated claimant who could prove the assailant held such an intent—such *fault*—would be covered.

Focusing on the fundamentals, workers' compensation is a "no-fault" system: "Compensation shall be payable irrespective of fault as a cause for the injury." § 440.10(2), Fla. Stat. Contrary to the majority's fault-based reasoning, existing law on accidents supports affirmance in this crime case. This no-fault concept operates to make accidents compensable, since by definition an accident is something that just happens, perhaps with no explanation; and the task of the workers' comp system is to be blind to the cause of the accident and take care of the injured worker. *See* § 440.02(1), Fla. Stat. ("'Accident' means only an unexpected or unusual event or result that happens suddenly."); *see also Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 89 (Fla. 2005) ("Workers' compensation laws provide employees limited medical and wage loss benefits, *without regard to fault*, for losses resulting from accidental workplace injuries in exchange for the employee relinquishing his or her right to seek common law recovery from the employer for those injuries.") (emphasis added). The majority opinion in effect rewrites sections 440.10 and 440.11, and jeopardizes employers' legislatively mandated immunity as well as the balance the Legislature achieved in requiring such immunity.

It takes little imagination to understand that in many if not most work-related "accidents," a human somewhere is "at fault" in the sense of doing something wrong, or failing to do something that should have been done. Analytically for comp purposes, that is no different from a human deciding to commit a crime. Viewed from the perspective of an employee who becomes a crime victim at work, crime is a species of accident, and the victim of workplace crime is just as entitled to comp benefits—and the advantages of the comp system—as is the victim of a poorly-assembled or defective scaffold. In fact, chapter 440 dictates, and this Court has consistently recognized, that claimants who are injured at work because they refuse to use a safety device are still entitled to compensation benefits (subject only to a 25% reduction). *See* § 440.09(5), Fla. Stat. (providing accident remains compensable even if employee knowingly fails or refuses to use a safety appliance or observe a safety rule required by statute or lawfully adopted by the department, but benefits are reduced by 25%); *Escambia Cnty. Bd. of Cnty. Comm'rs v. Reeder*, 648 So. 2d 222, 224 (Fla. 1st DCA 1994) (examining applicability of section

440.09(4)). Denying compensation to a crime victim who is unable to prove work-related motive is like trying to make any workplace-accident victim prove fault. Neither is required. Neither is consistent with the purposes and goals of the comp system.

The Florida Supreme Court made this point eloquently:

> The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives an award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee and the same award issues. Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.

Taylor v. Sch. Bd. of Brevard Cnty., 888 So. 2d 1, 5 (Fla. 2004) (quoting 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation, Desk Edition* § 1.03, at 1–4 to 1–5 (2003)). Why—and by what authority—would we insert a fault requirement (intent, motive) for one kind of workplace accident, a workplace crime? Yet that is the practical result of first ignoring workplace exposure to risk of crime and then also requiring a crime victim—who without dispute was within the scope and course of employment—to show work-related criminal intent. That is wrong. Any inquiry into the assailant's intent or purpose, any divide between what could happen at work and what could happen at home, should not become the dispositive factor. To do so analyzes a comp claim like a tort claim, contrary to statute and legislative intent.

Analogous support for compensability exists in the context of psychiatric injuries arising out of criminal attacks. Section 440.093(1) provides that psychiatric injuries are compensable if

they result from physical injuries sustained at work. § 440.093(1), Fla. Stat.[5] We have applied that statute to hold that an employee who was forcibly raped while in the course and scope of employment was entitled to compensation for her related psychiatric injuries. *See McKenzie v. Mental Health Care, Inc.*, 43 So. 3d 767, 769 (Fla. 1st DCA 2010). We expressly observed that "the physical injury [rape, a crime] is *certainly compensable*." *Id*. (emphasis added) (citing the general compensability statute, § 440.09). To be fair, we did not expound on that conclusion in *McKenzie*, which a detractor might say undermines it—while a supporter might say it was so obvious it needed no further elucidation. *See also McIntosh v. CVS Pharmacy*, 135 So. 3d 1157, 1158–59 (Fla. 1st DCA 2014) (holding that employee who was robbed at work could recover for resulting PTSD only if she suffered an underlying physical injury). At a minimum, under the plain language of that statute as we applied it in *McKenzie* and *McIntosh*, it would be anomalous indeed to hold that any of Claimant's psychiatric injuries would be compensable but his physical injuries are not.

The bottom line is that the majority's imposition of a new and onerous standard, requiring victims of crime at work to prove an assailant's intent, motive, or fault, is entirely unfounded and contrary to established law. The unfortunate facts thrust upon Claimant deprive him of the ability to satisfy any such test, which is particularly troubling given the utter lack of authority making that the exclusive test. The majority stops too soon by recognizing that Claimant's presence at work, and his walking on the workplace premises in the course of performing his job duties, shows course and scope but is legally insufficient to satisfy the separate "arising out of" requirement. Instead, the proper inquiry on these facts is whether the evidence established that Claimant's work and workplace exposed him to the risk of injury from criminal acts. And the evidence did just that.

---

[5] We have recognized that these physical-injury prerequisites "reflect similar traditional tort-law limitations on recoveries for psychiatric injuries"; i.e., the so-called impact rule. *Kneer v. Lincare & Travelers Ins.*, 267 So. 3d 1077, 1081 (Fla. 1st DCA 2019).

B. Risk Exposure Shows "Arising Out Of."

Once we mark out the boundaries of course and scope of employment, which is undisputed here, we turn to the related but separate question of determining whether working in a certain place and time and in a certain physical setting *also* creates and exposes a claimant to the conditions that allowed the incident to arise. Such evidence can satisfy the "arising out of" test, and does so here.

We reasoned in *Santizo-Perez* that the dangerous work location at night placed the decedent at a risk "incident to the hazards of industry." *Santizo-Perez*, 138 So. 3d at 1149–50.[6] We held that the incident arose out of employment because the decedent's job required him to be in what turned out to be a dangerous place. *Id.* at 1150. *Santizo-Perez* thus rejects relying exclusively on a criminal assailant's motive and fault, while demonstrating that a risk-exposure analysis of the course-and-scope evidence can establish the "arising out of" factor. The majority errs by analyzing this issue too narrowly, asking only whether Claimant's walking at and for work directly caused his injuries, as in a fall. The proper approach is a broader risk analysis.

Here, Claimant's work by its nature involved interaction with and exposure to a lot of people. He had to be at work until midnight and beyond, and predictably so. Anyone familiar with the office routines could notice that pattern. Claimant's work required him to leave the relative security of an interior hotel lobby and walk outside, alone and possibly carrying cash, to the more remote back office. The heavily commercial surroundings brought many people into and outside the hotel lobby at all hours. Gates that could have blocked outside access to Claimant's walking path were left open. The many people on site had free view of, and access to, Claimant's work areas and the walkway between them. The path to the back

[6] Our reasoning did not focus on the alleged and tangential involvement of the decedent's work colleague, although we noted that such a connection also could help show the "arising out of" factor if it had been established. *Santizo-Perez*, 138 So. 3d at 1150.

office provided a sitting area, and was dark in places. The lighting and the path to the back office limited Claimant's ability to see whether someone was hiding, and required Claimant to turn his back to some spots where people could be hiding. These undisputed facts go beyond mere course and scope, and establish that, like the decedent in *Santizo-Perez*, Claimant was subjected to this attack because of risks "incident to the hazards of [his] industry." *See id.* "Arising out of" is satisfied.[7] Yet under the majority's novel rationale, employees will be subject to disparate treatment depending on non-work factors such as the relative risk of crime between work and home; whether their assailants are apprehended or not; and if apprehended, the evidence of their personal motives.

The correct disposition is to find compensability, consistent with our settled precedent asking whether a claimant's presence at the workplace and performance of work tasks *also* exposes the claimant to increased hazards, including the risk of becoming a crime victim. Forty-two years ago in *Strother*, our supreme court affirmed the principle of compensability for work-related crimes. 383 So. 2d at 628. In *Strother*, thieves followed the claimant home from her job at a cafeteria, thinking she had the day's cash receipts with her. *Id*. They robbed her. *Id.* The supreme court held that the criminal assault arose out of the claimant's employment, and was thereby compensable, despite its occurring at the claimant's home. *Id*. This illustrates a broader inquiry than the one the majority incorrectly finds dispositive here.

Likewise and very nearly on-point as to the analysis, we very recently rejected the argument that an employee was not "actively engaged" in work because "walking through Employer's building on her way out was an unavoidable part of her job." *Soya v. Health First, Inc.*, 337 So. 3d 388, 390 (Fla. 1st DCA 2022). We reasoned as follows:

---

[7] To any readers thinking of using this list of factors out of context to extend *CMS v. Valcourt-Williams*, 271 So. 3d 1133 (Fla. 1st DCA 2019): don't. *See Silberberg v. Palm Beach Cnty. Sch. Bd.*, 335 So. 3d 148 (Fla. 1st DCA 2022); *Soya*, 337 So. 3d at 389–90.

> Where an accident's cause is unknown, it is error to deny compensability on grounds that the accident "could have happened elsewhere," . . . because doing so overlooks the express language of section 440.10(2) providing that "compensation shall be payable irrespective of fault as a cause of the injury," and the rationale underlying this court's holdings in *Caputo* [*v. ABC Fine Wine & Spirits*, 93 So. 3d 1097 (Fla. 1st DCA 2012] and *Walker* [*v. Broadview Assisted Living*, 95 So. 3d 942 (Fla. 1st DCA 2012)].

Soya, 337 So. 3d at 389–90 (quoting *Ross v. Charlotte Cnty. Pub. Schs.*, 100 So. 3d 781, 782 (Fla. 1st DCA 2012)). *See also Alvero v. Watermark Ret. Cmtys.*, 352 So. 3d 356, 356 (Fla. 1st DCA 2022) (confirming requirement of increased-hazard analysis in cases involving a contributing cause outside of employment). Our observations in *Soya* and *Alvero* cannot be reconciled with the majority's analysis or conclusion here.

We and other courts have a long history of finding criminal injuries compensable with no difficulty, either rejecting civil tort claims in favor of compensability, or confirming compensability of cases brought into comp from the outset. *See Lovin Mood, Inc. v. Bush*, 687 So. 2d 61, 62 (Fla. 1st DCA 1997) (holding that that a rape was compensable because the victim was an employee and at work when the crime occurred); *Prof. Tel. Answering Serv., Inc. v. Grace*, 632 So. 2d 609, 610 (Fla. 2d DCA 1993) ("[W]e are called upon to determine whether, as a matter of law, an employer is prohibited from pleading the affirmative defense of workers' compensation immunity when its employee is the alleged victim of a workplace sexual assault by a third party. We conclude that it is not."); *Winn Dixie Stores, Inc. v. Parks*, 620 So. 2d 798, 799 (Fla. 4th DCA 1993) (holding "[a] work-related assault is covered by workers' compensation," such that supermarket had immunity from civil lawsuit for work-related shooting); *Popiel v. Broward Cnty. Sch. Bd.*, 432 So. 2d 1374, 1375 (Fla. 1st DCA 1983) (holding that school district clerk who was assaulted while traveling from one school facility to another was entitled to benefits); *McDaniel v. Sheffield*, 431 So. 2d 230, 231 (Fla. 1st DCA 1983) (holding that the death of a convenience store employee who "was shot and killed by an unknown armed robber" "arose out of and in the course of

his employment," such that "his surviving widow received workers' compensation death benefits as provided by law"); *Jean Barnes Collections,* 413 So. 2d at 798 (holding that an assault and rape were compensable because the victim was an employee traveling to a training session at the employer's request); *Jenkins v. Wilson,* 397 So. 2d 773, 774–75 (Fla. 1st DCA 1981) (holding that a rape in the company parking lot was compensable because the employment created the hazard by requiring the employee to work late); *see generally Annotation, Workmen's Compensation: Injury from Assault*, 112 A.L.R. § 1258, at II(c) (1938 & Supp. 2022) ("Where there is some causal connection between the employment and the assault, or where the conditions of the employment have the effect of exposing the employee to an assault, it is generally held, in the absence of extenuating factors, that the injury is compensable.").

To any extent that it is necessary for claimants injured by workplace crimes to show work-connectedness, these precedents establish that the showing is made by demonstrating increased hazards or exposure to risk. Claimant made that showing here. We have never before required a claimant to prove that an assailant's motive was work-related. The majority errs by ignoring or attempting to distinguish controlling authorities because there was also some evidence that those assailants may have had some connection to the workplace or the injured worker.

The majority's conclusion that there was "only one cause" of Claimant's injuries because "[h]e was shot" is far too narrow a focus. Likewise, the majority's dicta asserting that no shooting-related incident could be compensable except perhaps at a gun range is both contrary to precedent and dangerously overbroad. Maj. Op. at 9. As the JCC correctly concluded, Claimant adduced competent and substantial evidence establishing that workplace conditions exposed Claimant to the risk of crime. Those facts both satisfy the "arising out of" prong of the analysis, and demonstrate that such exposure was the major contributing cause of Claimant's injuries. We should affirm.

William H. Rogner, Winter Park, for Appellant.

Michael J. Winer, Tampa; Charles W. Smith, Orlando; Michael A. Edwards, West Palm Beach, for Appellees.